

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-560

April 11, 2007

PAUL RAY WILLIAMS and
DONNA ANITA WILLIAMS
APPELLANTS

AN APPEAL FROM LONOKE
COUNTY CIRCUIT COURT
[CV2002-204]

V.

HON. LANCE L. HANSHAW, JUDGE

JEFFREY M. HERTZOG
APPELLEE

AFFIRMED

The issue in this case is whether an “as-is” clause in the buyer’s-disclaimer provision of a realty contract that prohibits a buyer from relying on any representations or disclosures made by the seller protects a seller who makes a fraudulent misrepresentation in the disclosure form that is also made part of the parties’ agreement. We hold that it does not and thus, affirm the judgment against the sellers in this case, appellants Paul Ray Williams and his wife, Donna Anita Williams.

Appellee Jeffrey M. Hertzog filed a complaint in May 2002, asserting several claims against the Williamses relating to his July 2001 purchase of their house, and alleging \$15,750 in damages. The surviving claim that is the subject of this appeal is Hertzog’s claim of fraud due to the Williamses’ misrepresentation regarding a foundational defect in the house and their failure to disclose related sheetrock repairs that were made. A bench hearing on the

complaint was held on December 7, 2005.¹ The evidence adduced at the hearing was as follows.

The Williamses built the house at issue in this case in Cabot, Arkansas, in 1992. They resided in the house from November 1992 until January 1995. They thereafter rented the property to others from 1995 through 1999, when their tenants abandoned the property. They sold the property to Hertzog in July 2001.

Hertzog personally viewed the property before he purchased it. He looked at the house, including the house's interior, "right at dusk" when visibility inside the house "was not real good" but light was coming in through the windows. The only damage Hertzog noticed at that time was a crack in the carport floor where the carport joined the house. Hertzog asked his realtor about the damage. Hertzog said his realtor called the Williamses' realtor who explained, to Hertzog's satisfaction, that the cracks were indicative of "normal settling" because the foundation was laid at a different time than the carport.²

Seeing no other damage to the house, and without benefit of a professional inspection, Hertzog accepted the house "as is" pursuant to the buyer's-disclaimer provision of the realty contract that reads:

Buyer agrees to accept the Property 'as is' in its present condition, and agrees to hold the Seller(s), the Listing Agent Firm and the Selling Agent Firm involved in this Real Estate Contract harmless of any problems relative to the mechanical or structural defect or failure in any of the components of the Property that may exist or be discovered (or occur) after closing.

. . .

BUYER'S DISCLAIMER OF RELIANCE: BUYER CERTIFIES THAT BUYER HAS PERSONALLY INSPECTED, OR HAD A REPRESENTATIVE INSPECT THE PROPERTY AS FULLY AS BUYER DESIRES AND IS NOT RELYING AND SHALL NOT THEREAFTER RELY UPON ANY WARRANTIES, REPRESENTATIONS OR STATEMENTS OF THE SELLER...REGARDING

¹The reason for the lengthy delay in holding the hearing was not apparent from the record.

²This testimony was undisputed and no hearsay objection was raised.

THE AGE, SIZE, QUALITY, VALUE OR CONDITION OF THE PROPERTY... (INCLUDING ANY WRITTEN DISCLOSURES PROVIDED BY SELLER AND DESCRIBED IN PARAGRAPH 16 OF THIS REAL ESTATE CONTRACT), IF ANY, WHETHER OR NOT ANY EXISTING DEFECTS IN ANY SUCH REAL OR PERSONAL PROPERTY MAY BE REASONABLY DISCOVERABLE BY BUYER OR BY REPRESENTATIVE HIRED BY BUYER....

(Emphasis added.) In turn, Paragraph 16 requires the seller to provide “a written disclosure about the condition of the Property which will contain information that is true and correct to the best of the Seller’s knowledge.”

The Williamses completed the disclosure required pursuant to Paragraph 16. On the form, the Williamses checked “Yes” after the following question: “Has there been any settling from any cause, or slippage, sliding or other poor soil conditions at the Property or to adjacent properties?” As further explanation to their answer to this question, the Williamses indicated “normal settling.”

In addition, the Williamses checked “No” in response to the following three questions:

Are there room additions, *structural modifications or other alterations or repairs* made to the Property since the Property was originally constructed?

...

Are you aware of any facts, circumstances, or events on or around the property which, if known to a potential buyer could adversely affect in a material manner the value or desirability of the Property?

...

Are there any other defects in the Property known to you?

(Emphasis added.)

Mr. Williams initially testified that he did not make any repairs to the house after he and his wife moved out of the home and that he was not aware of any repairs that had been made to the home. Ultimately, however, he admitted that while he was readying the house for sale, he saw three or four cracks in the house, which he termed “hairline” cracks, measuring approximately six-to-ten inches in length. Mr. Williams filled in the cracks with spackle and painted over them. Mr. Williams failed to disclose these repairs to Hertzog. He testified that when he answered the questions on the disclosure statement and indicated that

the house had undergone “normal settling” that was the truth as he knew it to be — in other words, despite having repaired cracks in the sheetrock, Mr. Williams claimed that he did not know the house had any foundational defects.

Hertzog thereafter purchased the Williamses’ house in July 2001 and moved into the house in August 2001. According to Hertzog, approximately two or three months later, “it started raining a lot” and cracks “just started appearing” throughout the home and continued to grow “bigger and bigger.” He described the cracks appearing near “basically every door,” including the pantry door, the sliding glass door, and the laundry room door. He also said that he was unable to open his kitchen door without kicking it in from the outside. Hertzog further testified that the counters were separating from the wall, that there is a crack in the concrete coming into the kitchen door and in the corner from the kitchen into the hallway, and that the trim is separating from the front door.

The photos of the home corroborate Hertzog’s testimony regarding the damages suffered in this case. If the cracks were merely hairline cracks when Mr. Williams saw them, then the house suffered considerable additional damage within a short period after Hertzog purchased the home. Some of the cracks are much more than mere hairline cracks; some appear to be lengthy crevices. In some photos, the walls are actually separating from the ceiling and the floor. One of the photos depicts the bathroom counter separating from the wall. In another photo, the underlying framework of the wall is visible; in another, a nail visibly protrudes through the textured finish of the ceiling.

Due to this damage, Hertzog obtained an estimate from Power Lift, a company that repairs foundational damage to houses. Blake Ronk, a sixteen-year veteran in the profession of foundation repair, inspected the house and found cracks in the sheetrock and masonry. He concluded “that the house had previous signs of repair and sheetrock work.” Ronk said that the signs of repair work were easy for him to spot but he did not “know how easy it would

be for somebody that's not used to seeing repair work to spot it."

Ronk further testified that he could not exactly recall the location and extent of the repairs he saw during his inspection. When asked if the cracks could have been "inconsequential hairline cracks," Ronk said, "Anything is possible." He also said that Photograph # 24 (which shows the cracking in the concrete floor along carport wall) was a good indicator of the type of cracks that were previously repaired. Photograph # 10 depicts a clearly visible previous repair.

Ronk testified that if previous cosmetic repairs were made, they were not adequate. He explained that when a crack is patched and filled with spackling, the crack will thereafter "bulge out" the filling material when the moisture returns to the soil and causes the house to swell. He also conducted an elevation survey, which revealed that the highest end of the house was three inches lower than the lowest end.

Ronk provided Hertzog with a written estimate in which Ronk noted, "Appears to have previous sheetrock repair," and "not responsible for previous sheetrock repair or new crack that may appear as a result of previous repairs." Ronk opined that it was necessary to install sixteen hydraulically driven steel pilings around the perimeter of the house and ground underneath portions of the concrete foundation. He explained that would stabilize those portions of the house and would guarantee those areas would not settle any further. He also testified that had those repairs been made at the time the cosmetic repairs were made then the house would not have deteriorated as it had. However, Ronk was unable to definitively state that the house would continue to deteriorate if the repairs were *not* undertaken. The estimated cost of the repairs recommended by Ronk is \$15,750.

Hertzog testified that no problems were disclosed to him, other than the crack he saw in the carport. He admitted that he accepted the home knowing that it had settled some because he accepted the explanation, given by the Williamses' realtor to his realtor, that the

settling was normal. Hertzog also admitted that he did not get a professional inspection before he bought the house or even after he noticed the damage. When asked at the hearing, “Did you agree with that check mark [in the as-is provision] relying upon what was in the disclosure statement?” Hertzog responded, “I sure did.” Moreover, he said that had he known “it was going to be like this, I wouldn’t have done it.”

The trial court requested briefs from the parties to address the issue of whether an “as is” clause “wipe[s] out” the seller’s duty to disclose any repairs that have been made to the home. On February 23, 2006, the trial court entered a \$15,750 judgment in Hertzog’s favor. In its order, the court noted while the Williamses indicated on the disclosure form that no repairs had been made and that the only settling due to poor soil condition was normal settling, the testimony by Ronk “was that major settling had occurred and much repair work needed to be done but that only cosmetic repair had been performed.” The court further found that Hertzog had the right to rely on the Williamses’ disclosure and did so to his detriment. Thus, the court found that the repair disclosure was a fraudulent disclosure and awarded damages of \$15,750, the amount of the repair estimate.

I. Fraudulent Misrepresentation

The Williamses assert that Hertzog failed to prove his fraudulent misrepresentation claim. They raise three arguments in this regard: that they were not required to disclose the minor repairs to the sheetrock; that Hertzog failed to prove that he relied on the disclosure statement; and that, if he relied on the statement, he failed to prove that his reliance was justified.

Pursuant to Arkansas Rule of Civil Procedure 52(a), the standard of review in bench trials is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Cochran v. Bentley*, __ Ark. __, __S.W.3d __ (Mar. 1, 2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing

court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.* We find no error and affirm the trial court's judgment.

The elements of a cause of action for misrepresentation are: (1) a false representation of a material fact; (2) knowledge or belief on the part of the person making the representation that the representation is false; (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation; (4) justifiable reliance by the other party; (5) resulting damages. See *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997). Thus, a representation is fraudulent when the person making it either knows it to be false or, not knowing, asserts it to be true. *Id.*

A. Failure to Disclose Repairs

The Williamses argue that the repair of “inconsequential hairline cracks” is not the type of repair that is required to be disclosed by the question, “Are there room additions, structural modifications or other alterations or repairs made to the Property since the Property was originally constructed?” They maintain that this question requires them to disclose only “significant” repairs such as structural modifications.

In interpreting an *identical* disclosure-of-repairs clause, we have rejected the precise argument that the Williamses advance. See *Beatty v. Haggard*, 87 Ark. App. 75, 184 S.W.3d 479 (2004). The *Beatty* court concluded that because the question regarding repairs is clearly presented in the *disjunctive*, it indicates two categories of repairs required to be disclosed: “structural modifications” and “other alterations or repairs,” which includes *nonstructural* modifications or cosmetic repairs.

Further, the fact that the repairs themselves seemed to be “cosmetic” does not relieve the seller of his duty to disclose them, especially where, as here, the cosmetic repairs may hide or mask a significant structural defect. A representation is fraudulent when the person making

it either knows it to be false or, not knowing, asserts it to be true. *See O'Mara, supra*. Here, the Williamses either knew the cracks hid a more serious problem and misrepresented that fact or they did not know and misrepresented the problems as “normal settling.” Given the *Beatty* court’s interpretation of an identical disclosure-of-repairs clause, we hold that the trial court in this case did not err in determining that the Williamses were required to disclose the repairs of the cracks in the sheetrock.

B. Reliance

The Williamses’ second argument is that Hertzog did not prove that he relied on the property disclosure statement. To the contrary, Hertzog expressly testified that he relied on the disclosure statement and the trial court credited his testimony. When asked at the hearing, “Did you agree with that check mark [in the “as-is” provision] relying upon what was in the disclosure statement?” Hertzog responded, “I sure did.” Thus, Hertzog relied on the disclosure statement in agreeing to the “as-is” provision of the realty contract. He also testified, in essence, that he would not have purchased the house if he had known about the previous repairs to the sheetrock.

It is true that Hertzog testified that he also relied on his own inspection and his realtor’s representation that the cracks were caused by “normal settling.” However, Hertzog testified, without objection or refutation, that his realtor’s representation to him was based on the Williamses’ realtor’s representation that the cracks were due to normal settling because the carport foundation had been laid at a different time than the foundation of the house. On these facts, we agree that Hertzog proved that he relied on the disclosure statement.

C. Justifiable Reliance

The real issue is whether Hertzog justifiably relied on the Williamses’ disclosures in light of the as-is provision that purports to prohibit him from doing so. The Williamses assert that Hertzog’s reliance on the statement was not justified because he purchased the property

“as is,” yet failed to have the property professionally inspected. We hold that Hertzog justifiably relied on the disclosure provision because an as-is clause in a realty contract cannot be given effect where the true condition of the home is fraudulently withheld from the buyer.

As an initial matter, while the sale of property “as is” generally relieves a seller from liability for defects in that condition unless the defects are patent, an “as-is” clause does not bar an action by the buyer based on claims of fraud or misrepresentation. See *Beatty, supra*. Nonetheless, a seller may still prevail on a misrepresentation claim where the property is taken “as is” and the buyer’s-disclaimer provision expressly provides that the buyer agrees not to rely on any written disclosures by the seller or upon any warranties or representations by the seller or his agent. See *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005). The mere fact that a buyer takes the property “as is” does not, per se, relieve the seller of the obligation to disclose repairs or defects. Pursuant to *Beatty* and *Barringer*, whether the seller is obligated to make such disclosures depends on the terms of the buyer’s-disclaimer provision, the representations made to the buyer, and the buyer’s own diligence in ascertaining the true condition of the home.³

In *Beatty, supra*, the buyer’s-disclaimer clause excluded from the disclaimer any written disclosures made by the seller; as such, the seller in *Beatty* was permitted to rely on the written disclosures made by the buyer. By contrast, the *Barringer* court held that the buyers failed to prove their misrepresentation claim where they alleged that the sellers misrepresented that a septic system existed on property when, in fact, the home was serviced by a single pipe leading from the house to the side of a mountain where it emptied into a ravine. The *Barringer* court reasoned that there was no fraudulent misrepresentation because the buyers

³Hertzog also relies on *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970), but that case is distinguishable because the buyer’s-disclaimer provision significantly differed from the one in the instant case. The *Wawak* case also involved an implied warranty of habitability, which is not at issue in the instant case.

were not expressly told that a septic tank was on the property but presumed that there was a septic system because the sewage system worked and all outward indications supported that presumption.

The instant case is unlike *Beatty* in that the as-is clause here expressly prohibited the buyer from relying on the written disclosures provided by the seller — in other words, Hertzog agreed not to rely on written disclosures made by the seller, whereas the buyer in *Beatty* made no such agreement. The buyer's-disclaimer provision here is nearly identical to the disclaimer in *Barringer* and expressly provides that the buyer will not rely on any written disclosures or representations made by the seller or the seller's agent. However, this case is unlike *Barringer* because the sellers in that case made no misrepresentation regarding the presence of the sewage system; rather, the buyer inspected the property and relied on his own assumption regarding the condition of the property. Because the facts of this case lie somewhere between the facts in *Barringer* and *Beatty*, neither case compels a specific result.

The crux of this case is the effect of an as-is provision in a realty contract where the seller misrepresents the true condition of the house. We hold that, in order for a seller's liability to be relieved under a buyer's-disclaimer provision, the seller must first inform the buyer as to the *true condition* of the house — not merely *the condition of the house as it is disclosed to the buyer*. The true condition of a home cannot be said to be disclosed to the buyer where that condition is hidden or misrepresented by the seller. Thus, a seller cannot include an as-is provision in a realty contract, thereafter make a fraudulent misrepresentation, and then attempt to shield himself from liability based on those misrepresentations by virtue of the as-is provision. If the as-is provision in this case is given effect where the sellers made a fraudulent misrepresentation, then the disclosure form included in the realty contract is merely an illusory term of the parties' agreement that induces fraudulent reliance. We refuse to give effect to such a provision.

An as-is provision and a disclosure form are included in a realty contract to induce a buyer to rely on them. The as-is provision notwithstanding, the Williamses cannot logically argue that they did not intend for Hertzog to rely on the disclosure form when it was made part of the realty contract. Both the as-is provision and the disclosure form in this case were drafted by the Williamses or by their agent. Thus, to the extent that the as-is provision here purports to prohibit Hertzog from relying on the Williamses' disclosures, it conflicts with the terms and purposes of the disclosure form. A disclosure that is made and then negated is not a disclosure at all. Any ambiguities created by the conflicting contractual terms must be resolved in favor the buyer. See *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

The Williamses correctly assert that once a purchaser of real estate receives notice of a problem, he has an affirmative obligation to make further inquiry, and if he fails to do so, his claim against the seller must fail. See, e.g., *Vaught v. Satterfield*, 260 Ark. 544, 542 S.W.2d 502 (1976). However, Hertzog did not fail to make further inquiry. Instead, he contacted his realtor, who contacted the Williamses' realtor, who gave assurances that the damage was due to "normal settling." The representation made by the Williamses' realtor would not have raised any red flags because it was consistent with the Williamses' fraudulent representations, on which Hertzog also relied, that the settling of the home was "normal settling" and that no other repairs had been made.

It is axiomatic that a buyer cannot purchase a house "as-is" when the true condition of the house is fraudulently misrepresented in the seller's disclosure form; the true condition of a house cannot be both hidden and disclosed. Here, it cannot be said that the true condition of the house was disclosed to Hertzog where the Williamses knew or should have known about the structural defect and not only failed to disclose the presence and true nature

of the defect and the repairs but also affirmatively misrepresented that the damage to the home was “normal settling.” On these facts, we agree that Hertzog justifiably relied on the misrepresentations the Williamses made in their disclosure form — that was the Williamses’ precise purpose in including the form in the parties’ agreement. Accordingly, we hold that the trial court did not err in finding that Hertzog proved his claim for fraudulent misrepresentation.

II. Damages

We also affirm the award of damages. The Williamses concede that the cost of repairs that are necessary for the preservation and protection of the home are a proper measure of damages. *See Pennington v. Rhodes*, 55 Ark. App. 42, 929 S.W.2d 169 (1996) (noting the proper measure of damages to a home generally is the cost of repairing the defects). Nonetheless, they argue that Hertzog failed to prove the cost of repairing *the cracks* in the home and proved only the cost of stabilizing the foundation. They also argue that Hertzog failed to prove the repairs to the foundation were necessary to preserve and protect the house because Ronk testified that the type of deterioration that the house suffered here does not continue in every case but sometimes will be halted by cosmetic repairs. Finally, they assert that, in granting judgment in Hertzog’s favor, the trial court failed consider that the repairs were not reasonably calculated to prevent further damage to the house and that the stabilization of the foundation would not necessarily repair any damage that had been done.

These arguments are without merit. Ronk’s testimony established that the cracks were caused by the foundational defects and that he recommended the installation of the sixteen steel pilings under the foundation *due to the cracks* he discovered when he inspected the house. He also guaranteed that the portions of the house to which the foundational repairs were made would not continue to settle.

While Ronk could not definitively state the cracks would continue to worsen if the repairs were not made, he did testify that had the repairs he recommended been performed when Mr. Williams discovered the cracks, the damages incurred would not have been incurred. Moreover, on the estimate Ronk provided, he indicated that Power Lift would not be responsible for previous sheetrock repair or new crack that may appear as a result of a previous repair, thus indicating the likelihood that the cracks could continue to worsen.

In any event, it is undisputed that, after being repaired by the Williamses, the damage progressed from the three or four six-to-ten inch “inconsequential hairline cracks” to much longer and wider cracks and continued to worsen after their discovery by Hertzog, to the point where the damage included separation of the some of the trim and separation of the walls from the floor and ceiling. Given these facts, the trial court could have reasonably inferred that the cracks and separation would continue to progress unless the foundational repairs recommended by Ronk were performed. The Williamses cannot now complain because Hertzog did not prove entitlement to the *additional* cost of repairing *the cracks*, thus limiting his damages to \$15,750, the cost of repairing the foundation.

Affirmed.

HART and BAKER, JJ., agree.